UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CONSUMER SOLUTIONS REO, LLC,

Plaintiff,

v.

RUTHIE B. HILLERY, *et al.*,

Defendants.

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No. C-08-4357 EMC

ORDER RE SANCTIONS

Previously, the Court sanctioned Mr. Spielbauer (Ms. Hillery's counsel) pursuant to 28 U.S.C. § 1927 for having reasserted the RESPA and FDCPA claims against Saxon in Ms. Hillery's amended counterclaims. *See* Docket No. 102 (order, filed on 1/8/2010). Saxon subsequently submitted a declaration stating that the attorney's fees it had incurred as a result of Mr. Spielbauer's conduct amounted to $661. *See* Docket No. 106 (Cayton Decl. ¶ 4). In response, Mr. Spielbauer has not contested the amount of sanctions but has challenged the imposition of sanctions. Having considered Mr. Spielbauer's submission, the Court hereby reconsiders and reaffirms its decision to impose a sanction and orders that Mr. Spielbauer pay Saxon $661.[1]

I. DISCUSSION

A. Due Process

In his submission, Mr. Spielbauer argues first that he was not given adequate notice and opportunity to be heard with respect to the matter of sanctions. While there is authority that

[1] Under California Business & Professions Code § 6068(o)(3), an attorney has a duty to self-report the imposition of judicial sanctions of $1,000 or more. *See* Cal. Bus. & Prof. Code § 6068(o)(3).

indicates otherwise, *see, e.g.*, *Toombs v. Leone*, 777 F.2d 465 (9th Cir. 1982),[2] the Court shall in the interest of justice reconsider the issue of sanctions so as to obviate any due process concerns. At this juncture, Mr. Spielbauer has had adequate advance notice that his conduct is potentially sanctionable pursuant to § 1927 based on his reassertion and argumentation in support of the RESPA and FDCPA claims against Saxon, and he has been given an opportunity to be heard through his written submission herein of January 22, 2010. Although Mr. Spielbauer has asked for a formal hearing, the Ninth Circuit has expressly stated that "an opportunity to be heard does not require an oral or evidentiary hearing on the issue. The opportunity to brief the issue fully satisfies due process requirements. " *Pacific Harbor Capital, Inc. v. Carnival Air Lines, Inc.*, 210 F.3d 1112, 1118 (9th Cir. 2000). He has had adequate opportunity to brief the issue, and the Court has fully considered that briefing.

B. Authority to Sanction Under § 1927

To the extent Mr. Spielbauer argues that the Court lacks the authority to sanction under 28 U.S.C. § 1927, *see* Opp'n at 6, that argument should be rejected. In *Moore v. Keegan Mgmt. Co. (In re Keegan Mgmt. Co., Sec. Litig.)*, 78 F.3d 431 (9th Cir. 1996), the Ninth Circuit simply held that "§

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[2] In *Toombs*, counsel for the plaintiff violated a local rule by submitting on the morning of trial a lengthy trial brief and extensive exhibits. "After entertaining oral argument, the court announced its decision to continue the trial and to impose monetary sanctions against [plaintiff's] counsel on the basis of [defendant's] wasted preparation costs." *Toombs*, 777 F.2d at 471.

> Because [plaintiff's] counsel received no advance notice that the district court was considering the imposition of sanctions, the question remains whether they had sufficient opportunity to demonstrate that their conduct was not undertaken recklessly or willfully. We conclude that they were given such an opportunity. At a hearing for which they did receive advance notice, [plaintiff's] counsel were able to argue against a motion to strike their brief and exhibits from the record. Any mitigating excuse they might have offered for their conduct presumably would have been forthcoming in that hearing. Thus, they did receive notice that the court would consider their reasons for failing to comply with Local Rule 235-4(j), and had sufficient opportunity to explain their conduct. Accordingly, the district court's provision of due process was adequate.

Id. at 471-72. The situation in *Toombs* is analogous to the situation in the instant case. Here, Mr. Spielbauer did have advance notice of Saxon's motion to dismiss, and any mitigating excuse he could have offered for reasserting the RESPA and FDCPA claims should have been forthcoming at that hearing.

1927 cannot be applied to an *initial* pleading." *Id.* at 435 (emphasis added). Here, the Court is dealing with amended counterclaims.

C. Unreasonable and Vexatious Multiplication of Proceedings

Under 28 U.S.C. § 1927,

> [a]ny attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927. "[S]ection 1927 sanctions 'must be supported by a finding of subjective bad faith'"; "'[b]ad faith is present when an attorney knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for the purpose of harassing an opponent.'" *Keegan*, 78 F.3d at 436.

In the instant case, Mr. Spielbauer makes several arguments as to why the RESPA and FDCPA claims were not frivolous. That, however, is not the issue.[3] The issue is whether Mr. Spielbauer unreasonably and vexatiously reasserted those claims given the Court's ruling on Consumer Solutions's motion to dismiss that those claims were not tenable. *See* Docket No. 102 (order, filed on 1/8/2010). The Court held that those claims were not tenable for reasons that were clearly applicable not only to Consumer Solutions but also Saxon. For example, the Court dismissed the RESPA claim -- predicated on the assumption that Consumer Solutions could be held vicariously liable for Saxon's conduct -- because a Qualified Written Request must ask for information relating to the servicing of the loan. "In the instant case, Ms. Hillery's letter of May 24, 2008, simply disputed the validity of the loan and not its servicing (*e.g.*, not whether Saxon had failed to credit her for payments she made pursuant to the loan)." Docket No. 70 (Order at 14). For the FDCPA claim, the Court specifically stated that, "[t]o the extent the FDCPA claim against Consumer Solutions is predicated on Saxon's conduct, the dismissal is with prejudice." Docket No. 70 (Order at 16).

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[3] That being said, the Court notes that, with respect to the FDCPA claim, 15 U.S.C. § 1692g does not require an initial communication to contain information about, *e.g.*, the amount of the debt, the name of the creditor to whom the debt is owed, and so forth. The statute provides that,"[w]ithin five days after the initial communication with a consumer in connection with the collection fo any debt, a debt collector shall . . . send the consumer a *written notice* containing" those things. 15 U.S.C. § 1692g(a) (emphasis added). Mr. Spielbauer's contrary argument is clearly without merit.

Moreover, the Court expressly stated in its ruling on Consumer Solutions's motion to dismiss that, "although this opinion addresses only the validity of the claims asserted against Consumer Solutions, Ms. Hillery should bear in mind that much of the reasoning would be applicable to any claim asserted against either Saxon or MERS." Docket No. 70 (Order at 1 n.1).

Finally, it should be noted that Mr. Spielbauer explicitly asked the Court for permission to wait to serve Saxon and MERS until after it had ruled on the Consumer Solutions's motion to dismiss, precisely because the rulings on the claims against Consumer Solutions would likely affect the claims asserted against Saxon and MERS.

Given the above, Mr. Spielbauer should not have reasserted the RESPA and FDCPA claims against Saxon in the amended counterclaims or, at the very least, in opposing Saxon's motion to dismiss -- which argued for dismissal based on the Court's ruling on Consumer Solutions's motion to dismiss, Mr. Spielbauer should have indicated that the claims were being reasserted simply to preserve the issue for appeal. Mr. Spielbauer did not take the latter course of action. Indeed, in the opposition, he fully argued the merits of the claims, requiring Saxon's response. *See* Docket No. 91 (opposition). Nowhere in the opposition did Mr. Spielbauer acknowledge that the reasoning articulated in the Court order on Consumer Solutions's motion to dismiss applied to Saxon. Indeed, his briefing contained inaccurate characterization of the Court's prior ruling. Thus, Mr. Spielbauer's present claim that he "believed that the merits needed to be argued to preserve the issue for appeal," Opp'n at 3, lacks credibility.

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II. CONCLUSION

Accordingly, the Court, having duly reconsidered the issue of sanctions where Mr. Spielbauer has now clearly been given notice and an opportunity to be heard, concludes that sanctions pursuant to § 1927 are appropriate. Mr. Spielbauer is ordered to pay Saxon sanctions in the amount of $661 within a week of the date of this order.

IT IS SO ORDERED.

Dated: January 28, 2010

EDWARD M. CHEN
United States Magistrate Judge